Filed 6/18/19 P. v. McKean and Hernandez CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Lassen)

THE PEOPLE, Plaintiff and Respondent, v. PERRYN MICHAEL MCKEAN, Defendant and Appellant.	C087489 (Super. Ct. No. CH034816)
THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER DANIEL HERNANDEZ, Defendant and Appellant.	C087503 (Super. Ct. No. CH034815)

In this consolidated appeal, defendants Perryn Michael McKean and Christopher Daniel Hernandez were convicted of charges related to a state prison yard fight with

another inmate. McKean argues the evidence was insufficient to support the true finding with respect to the enhancement for personal infliction of great bodily injury. He also contends the trial court erred in (1) giving a modified instruction for the great bodily injury enhancement and (2) failing to give a unanimity instruction for the great bodily injury enhancement. Finally, McKean argues his convictions should be reversed due to cumulative error.

Hernandez joins McKean's argument that it was error to fail to give a unanimity instruction for the great bodily injury enhancement. Hernandez further contends the trial court abused its discretion in ordering him restrained throughout the March 2018 joint trial. Finding defendants' contentions without merit, we will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Instant offense*

At 2:40 p.m. on July 17, 2016, Correctional Officer Robert Hicks was observing 200 inmates using the prison exercise yard when he noticed two inmates (later identified as Hernandez and McKean) attacking a third inmate. During the trial, Hicks testified that he saw Hernandez and McKean each using their fists to strike the victim in the face and upper torso. The victim was on his knees, trying to shield his face with his arms.

Hicks ordered all the inmates to get down and called for assistance, but the three men ignored him. Hicks and Correctional Officer Mark Dever approached the three men and noticed McKean making stabbing motions and leading with his right thumb. Hicks saw a glint of metal in McKean's right hand. Hernandez continued using his fists to strike the victim in the face and upper torso. Hicks saw Hernandez and McKean each hit the victim at least five times; McKean stabbed the victim more than three times. Dever testified at trial that he suspected McKean had an object in his hand because he saw blood on the victim's neck and upper body each time McKean moved his hand away.

The fight ended when responding officers used pepper spray on the three inmates. As McKean separated from the victim and Hernandez, he threw an object that was later identified as an inmate-manufactured weapon or shank. The shank had a sharp point.

The victim, who was bleeding from his ear, nose, eye, and mouth, was taken to the prison hospital and then to a local medical center for treatment. He suffered numerous puncture injuries on his abdomen, back, head, neck, and upper shoulder, with 30 to 35 on his back alone. The puncture wounds appeared to be superficial, but there was a large red area and scratches on his back. Although the puncture wounds had the potential to be life threatening, they were not. His right eye was cut and swollen shut, and he suffered three fractures in his cheek bone and eye socket. The victim required surgery to repair the fractures.

At trial, a nurse who treated the victim testified that, in his opinion, although the shank used by McKean could cause a fracture, the fractures suffered by the victim were caused by blunt force such as a punch. The jury was shown photographs of the injured victim and his clothing, which was covered in blood and had puncture holes.

At trial, McKean testified that he and the victim started fighting because the victim bumped into him in the yard. According to McKean, the fight "got out of control." McKean did not realize Hernandez was involved in the fight until it was over. McKean testified that he hit the victim with his fist in the eye and head, but he did not have a weapon.

2. *Jury instructions and closing argument*

The jury instructions included an instruction regarding multiple defendants pursuant to CALCRIM No. 203.[1] The jury also was instructed regarding the great bodily

---

[1] The jury was instructed regarding multiple defendants as follows: "Both defendants are charged in Count I, the attempted murder charge . . . . The defendant Hernandez is charged in Count II, assault by . . . a person serving a life prison sentence . . . . [¶]

injury enhancement pursuant to CALCRIM No. 3160, modified so that the word "defendant" in the standard instruction read "defendants."[2]

During closing argument, the prosecutor did not elect which of the victim's injuries constituted great bodily injury for purposes of the enhancement. He argued, "Was there great bodily injury? And the law tells you that great bodily injury is more than—it's something more than minor or moderate. Broken bones usually constitute great bodily injury and certainly three of them around the eye. . . . That's in addition to

---

Defendant McKean is charged in Count III of assault with a deadly weapon while . . . confined to state prison . . . and then [d]efendant McKean is charged in Count IV with custodial possession of a weapon . . . . [¶] Now, you must separately consider the evidence as it applies to each defendant. You must decide each charge for each defendant separately. If you cannot reach a verdict on all of or both of the defendants or on any of the charges against any defendant, you must report your disagreement to the Court and you must return your verdict on any defendant or charge on which you have unanimously agreed. [¶] Unless I tell you otherwise, all of the instructions apply to each defendant." (CALCRIM No. 203, as given.)

[2] The jury was instructed regarding the great bodily injury enhancement as follows (with emphasis added to the modifications to CALCRIM No. 3160): "[I]f you find the defendant**s** guilty of the crimes charged in Counts I, II or III, you must then decide whether the People have proved the additional allegation that the defendant**s** personally inflicted great bodily injury on [the victim] in the commission of that crime. The People must also prove that [the victim] was not an accomplice to that crime. [¶] Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm. [¶] If you conclude one or more than one person assaulted [the victim] and you cannot decide which person caused which injury, you may conclude that the defendant**s** personally inflicted great bodily injury on [the victim] if the People have proved that: [¶] [(1)] two or more people acting at the same time assaulted [the victim] and inflicted great bodily injury on him. [¶] [(2)] the defendant**s** personally used physical force on [the victim] during the group assault. [¶] And [(3)] the physical force the defendant**s** used on [the victim] was s[ufficient] in combination with the force used by others to cause [the victim] to suffer great bodily injury. [¶] The defendant**s** must have applied substantial force to [the victim]. If that force could not have caused or contributed to the great bodily injury, then it was not substantial. [¶] . . . [¶] The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved." (CALCRIM No. 3160, as given.)

the 30 to 35 puncture wounds and whatever happened with the ear. Three broken bones is certainly great bodily injury, so there was great bodily injury on the victim."

3. *Restraint of defendants during trial*

a. January 2018 hearing

During the January 2018 trial readiness conference, the prosecutor requested that defendants be shackled during the trial in leg restraints that would be worn under the pants and not be visible to the jury. The trial court indicated it would make an "interim" ruling that would not be binding for the trial, especially since a different judge would preside over the trial.

In support of the motion, the prosecutor provided a memorandum prepared by Sergeant J. Dansby of the Department of Corrections and Rehabilitation (CDCR) stating that Hernandez was a level IV inmate serving a sentence of life with parole. Hernandez's prior convictions were as follows: (1) in 2017, manufacturing a dangerous weapon while being a prison inmate (Pen. Code, § 4502, subd. (b)),[3] (2) in 2012, first degree murder (§ 187, subd. (a)), (3) in 2012, attempting to dissuade a witness (§ 136.1, subd. (b)(2)), and (4) in 2006, willful infliction of corporal injury on a spouse or cohabitant (§ 273.5, subd. (a)). Hernandez also had two serious prison rule violations, as follows: (1) in 2017, possession of a deadly weapon and (2) in 2014, battery on an inmate with a weapon.

Sergeant Dansby stated that Hernandez's CDCR classification score was at the "Highest Level of Security." Dansby opined that allowing Hernandez to be unrestrained during trial "presents a threat to court staff, jurors and the general public." In addition, if Hernandez was unrestrained, CDCR policy would require additional staff to be present

---

[3] Undesignated statutory references are to the Penal Code.

during trial. The prosecution also provided a memorandum from Dansby describing McKean's similar history.

Counsel for McKean opposed the request for restraints, arguing shackles were unnecessary. Counsel for Hernandez stated that he "join[ed] in [McKean's] argument. . . . [H]owever, if the alternative is additional officers in the courtroom, then I would like to revisit that issue with the trial judge." Counsel for McKean joined the argument.

The court granted the request for the nonvisible leg restraints, "with the understanding that it [was] to be revisited by the trial judge prior to any juror being brought into the courtroom." The court reasoned that the prejudice was minimal because the jury would not be able to see the restraints. In addition, as described in the memorandum from Sergeant Dansby, the defendants had a "number of aggravated type incidents" and faced serious current charges.

b. March 2018 hearing

During a March 2018 hearing before jury selection, the court (presided over by a different judge)[4] revisited the prosecution's request for restraints. The court observed that the charges against defendants were "serious" and involved a weapon, but stated that any disciplinary violations or prior crimes of violence would also be relevant to its decision. The prosecutor explained that the previous judge had issued a nonbinding ruling, but argued "good cause" had already been established for the restraints, based on defendants' criminal history and prison rule violations. The prosecutor reminded the court that the evidence was in the court file and argued the court could either accept the prior judge's ruling or review the evidence again.

---

[4] A different judge presided over the case starting in March 2018.

Hernandez's counsel stated, "[I]n my view, it's the lesser of two evils. I'd much rather have hidden restrains than an additional six to eight correctional officers lining . . . right behind my client, then that makes [him] look very dangerous." Hernandez's counsel rejected the court's suggestion of having the officers wear civilian clothing, arguing it was a small town and the officers would be distinguishable by their haircuts. Hernandez's counsel acknowledged that the type of restraints proposed by the prosecutor "[g]enerally . . . do not show." In his written in limine motion filed prior to the hearing, Hernandez's counsel did not object to the proposed restraints.

The court ordered the nonvisible restraints for defendants, reasoning he was making his ruling "based on the fact that the other judge in this case has previously weighed all this and made that ruling about the [nonvisible restraints], and so I'm going to view this as the law of the case and I'm going to adopt that." The court noted it was making its ruling "over the objection of the defendants because they don't want them to be restrained at all."

c. Defendants' choice to wear visible shackles

Before voir dire, counsel for Hernandez and McKean informed the court that their clients had chosen to wear prison garb with handcuffs and visible shackles at the legs, rather than the nonvisible shackles approved by the court. In response to questioning from counsel, Hernandez and McKean each confirmed it was his choice to wear the clothing and be shackled during trial. Hernandez further indicated he was aware of and waived any potential bias from the jury. The trial court stated it was the "judge's choice," and, after soliciting input from counsel, decided to allow each defendant to wear the prison garb and visible shackles.

4. *Verdict and sentencing*

In March 2018, a jury found McKean guilty of (1) assault with a deadly weapon while incarcerated and found true that McKean personally inflicted great bodily injury on the victim, and (2) unlawful possession of a sharp instrument while incarcerated.

(§§ 4501, subd. (a), 12022.7, subd. (a), 4502, subd. (a).) The jury found Hernandez guilty of assault by means of force likely to produce great bodily injury while undergoing a life sentence and found true that Hernandez personally inflicted great bodily injury on the victim. (§§ 4500, 12022.7, subd. (a).) Hernandez and McKean each admitted to having a prior strike. (§ 667, subds. (b)-(i).)

In May 2018, the trial court sentenced McKean to state prison for an aggregate term of 15 years. The trial court sentenced Hernandez to state prison for an aggregate term of 21 years to life.

DISCUSSION

I

McKean contends there was insufficient evidence to prove that he personally inflicted great bodily injury during the assault. McKean argues that when the jury found him guilty of assault with a deadly weapon, it necessarily also found that he was the one who used the shank during the assault. McKean appears to assume this meant the jury found he *only* assaulted the victim with the weapon, despite his own testimony that he used his fist to strike the victim in the face and upper torso. According to McKean, he could not have inflicted great bodily injury on the victim because the puncture wounds from the shank were only superficial, while the more serious injuries were to the victim's face and were caused by blunt force trauma from punches.

In considering a claim of insufficient evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence such that a reasonable jury could find the defendant guilty beyond a reasonable doubt. (*People v. Elliot* (2005) 37 Cal.4th 453, 466.) We presume the existence of every fact supporting the judgment that the jury reasonably could deduce from the evidence, and a judgment will be reversed only if there is no substantial evidence to support the verdict under any hypothesis. (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Jennings* (2010) 50 Cal.4th 616, 638-639.) We do not substitute our judgment for that of

the jury, reweigh the evidence, or reevaluate the credibility of witnesses. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The jury's findings on enhancement allegations are reviewed under the same standard. (See *People v. Wilson* (2008) 44 Cal.4th 758, 806.)

Great bodily injury is a "significant or substantial physical injury." (§ 12022.7, subd. (f).) A victim need not suffer a permanent, prolonged, or protracted disfigurement, impairment, or loss of bodily function. (*People v. Escobar* (1992) 3 Cal.4th 740, 750.) "Abrasions, lacerations, and bruising can constitute great bodily injury. [Citation.]" (*People v. Jung* (1999) 71 Cal.App.4th 1036, 1042.) We will uphold a great bodily injury finding if it is supported by substantial evidence, even if the circumstances might reasonably be reconciled with a contrary finding. (*Escobar*, at p. 750.)

Even if we accept McKean's contention that the jury found that he only assaulted the victim with the shank, the victim suffered over 30 puncture wounds to his back, neck, head, abdomen, and upper shoulder. Although these wounds may have been superficial, they had the potential to be life threatening. In addition, the victim had a large red area and scratches on his back. The two shirts he was wearing had puncture holes and were covered in blood, suggesting the puncture wounds were significant. The jury saw photographs of the victim's injuries and clothing, providing jurors the opportunity to observe and assess the nature and extent of the injuries.

Moreover, the prosecutor argued that great bodily injury could be proven by the victim's facial fractures as well as by the "addition[al] 30 to 35 puncture wounds and whatever happened with the ear." Viewing the evidence in the light most favorable to the jury's finding, we conclude sufficient evidence supports the jury's finding of great bodily injury as to McKean.

II

McKean further contends the trial court erred in instructing the jury with a modified version of CALCRIM No. 3160 regarding the great bodily injury enhancement. Even though the only change was to make plural the singular reference to "defendant,"

reflecting that this was a joint trial and both defendants were alleged to have personally inflicted great bodily injury, McKean argues the changes "essentially told the jury that it could find [McKean] personally inflicted great bodily injury on [the victim] based on [Hernandez's] use of physical force during the assault." McKean argues the "most problematic portion" of the instruction is as follows: "The defendants must have applied substantial force to [the victim]. If that force could not have caused or contributed to the great bodily injury, then it was not substantial." We find no reasonable likelihood the jury misunderstood the instruction as McKean suggests.

We review de novo whether a jury instruction correctly states the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) At issue is whether the trial court " 'fully and fairly instructed on the applicable law.' " (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) We look to the instructions as a whole and the entire record of trial, including the arguments of counsel. (*People v. Stone* (2008) 160 Cal.App.4th 323, 331.) Where reasonably possible, we interpret the instructions " 'to support the judgment rather than to defeat it.' " (*Ramos*, at p. 1088.)

Section 12022.7, subdivision (a) provides additional punishment for "[a]ny person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony." As explained in *People v. Modiri* (2006) 39 Cal.4th 481 (*Modiri*), it is proper to find personal infliction of great bodily injury where a defendant "physically joins a group attack, and directly applies force to the victim sufficient to inflict, or contribute[s] to the infliction of, great bodily harm. . . . [T]he defendant need not be the sole or definite cause of a specific injury."[5] (*Id.* at p. 486.)

---

[5] Although *Modiri* considered the personal infliction requirement in section 1192.7, subdivision (c)(8), the court applied its holding equally to the personal infliction requirement under section 12022.7. (*Modiri*, *supra*, 39 Cal.4th at pp. 495-496.)

The *Modiri* court upheld former CALJIC No. 17.20 (the precursor to CALCRIM No. 3160), noting that it "reasonably convey[e]d" the core principles of the group beating theory: "The instruction applies if [the jurors] decide that [the defendant] 'participate[d]' in a group beating, and that 'it is not possible' to determine which assailant inflicted a particular injury. [Citation.] Both prongs of the instruction permit a personal-infliction finding in this instance only if the defendant personally 'appli[ed] unlawful physical force' to the victim. [Citation.] [The instruction] makes clear that the physical force personally applied by the defendant must have been sufficient to produce great bodily injury either (1) by itself, or (2) in combination with other assailants. Both group beating theories exclude persons who merely assist someone else in producing injury, and who do not personally and directly inflict it themselves." (*Modiri, supra*, 39 Cal.4th at pp. 493-494.) Courts have similarly upheld CALCRIM No. 3160, which contains substantially the same language. (See, e.g., *People v. Dunkerson* (2007) 155 Cal.App.4th 1413, 1418.)

Just as in *Dunkerson* and *Modiri*, the jury instruction here properly set forth the two scenarios of guilt. It correctly conveyed the core principles of the group beating theory, specifying that if the jury was unable to determine whether Hernandez or McKean caused a specific injury, the jury could find the two defendants liable only if they had "personally used physical force on [the victim] during the group assault," and that physical force was sufficient "in combination with the force used by others to cause [the victim] to suffer great bodily injury." In addition, the jury was instructed that it could find the defendants liable only if they applied "substantial force to [the victim]," and force was substantial only if it could have "caused or contributed to the great bodily injury."

In referring to "defendants" rather than "defendant," the instruction reflected the fact that each of the two defendants in this case had been accused of personally inflicting great bodily injury on the victim in a group beating scenario. The instruction made clear that it was the jury's responsibility to consider whether the People had proven that

Hernandez *and* McKean had done so by instructing that "[t]he People have the burden of proving *each* allegation beyond a reasonable doubt." (Emphasis added.) This was reinforced by the individual verdict forms for each defendant with respect to the great bodily injury enhancement. According to the Judicial Council's guide, the CALCRIM instructions are drafted for "the common case" involving a single defendant, and it may be necessary to modify the instructions for use in multi-defendant cases. (Guide for Using Judicial Council of California Criminal Jury Instructions, (2019) Using the Instructions, Multiple-Defendant and Multiple-Count Cases, p. xxi.)

Moreover, the trial court instructed the jury pursuant to CALCRIM No. 203 that "all of the instructions apply to each defendant." The court did not contradict this guidance by instructing the jury to consider the application of the great bodily injury enhancement based solely on the actions of Hernandez or McKean. In addition, the jury was told that it had to "decide each charge for each defendant separately," and "separately consider the evidence as it applies to each defendant." Under the circumstances, we do not find a rational jury would have misapplied the instructions in the manner McKean complains of here. Given our conclusions, we need not address McKean's related argument that his counsel was ineffective in failing to object to the instruction.

III

McKean argues the trial court failed to instruct the jury that it had to find unanimously beyond a reasonable doubt that defendant committed a particular act in order to find the great bodily injury enhancement true, and that this failure violated his federal constitutional right to a jury trial on each element of the charge.[6] According to

---

[6] The pattern instruction for unanimity states: "The defendant is charged with _____ <*insert description of alleged offense*> [in Count ___] [sometime during the period of ____ to ____]. [¶] The People have presented evidence of more

McKean, some jurors may have believed he caused great bodily injury with the shank, while others may have believed he caused great bodily injury by hitting the victim with his fist. Hernandez joins in this argument. We find defendants' contentions without merit.

A defendant has a right to a unanimous verdict, including unanimous agreement that the defendant "is guilty of a *specific* crime." (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) Still, "unanimity as to exactly how the crime was committed is not required. Thus, the unanimity instruction is appropriate 'when conviction on a single count could be based on two or more discrete criminal events,' but not 'where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.' " (*Id.* at p. 1135.) When determining whether to give the instruction, the trial court must consider "whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction." (*Ibid.*) A trial court should give a unanimity instruction even absent a request where the circumstances of the case so dictate. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 877.)

In *People v. Robbins* (1989) 209 Cal.App.3d 261, the court held that the trial court was not required to instruct the jurors that they had to unanimously agree which injuries sustained by the victim supported each enhancement allegation. The *Robbins* court reasoned that when reaching a finding on a great bodily injury enhancement, "the jurors are to look at the nature and extent of the injury sustained and decide whether it rises to a

---

than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed." (CALCRIM No. 3500.)

level they consider significant or substantial." (*Id.* at p. 265.) This makes the analysis "different" than under a unanimity instruction: instead of considering whether a defendant is guilty of a crime based on two different factual scenarios, a jury considering a great bodily injury enhancement "performs a measuring function, deciding whether the victim suffered that quantum of injury legally defined as great bodily injury. To make this determination, the entire course of conduct and its overall result—not each act and individual injury—must be examined." (*Ibid*.)

Similarly, in the group beating situation at issue here, the jury was required to consider whether the victim suffered great bodily injury, and whether Hernandez or McKean personally applied force "sufficient to produce great bodily injury either (1) by itself, or (2) in combination with other assailants." (*Modiri, supra,* 39 Cal.4th at pp. 493-494.) Accordingly, no unanimity instruction was required because the jury could only divide on the exact way Hernandez or McKean personally applied force, rather than whether each personally inflicted great bodily injury. Such a conclusion is in line with the purpose of the group beating theory: even though "the evidence [in group beating cases] is often conflicting or unclear as to which assailant caused particular injuries in whole or part," a defendant who participates directly and substantially in a group beating is not "immune from a personal-infliction finding for the sole reason that the resulting confusion prevents a showing or determination of this kind." (*Id.* at pp. 496-497.)

Given our conclusions, we find McKean's claim of cumulative error to be without merit.

IV

Hernandez contends the trial court abused its discretion in ordering him restrained throughout the trial. Despite the fact that during the March 2018 hearing the prosecutor noted he had previously presented evidence of Hernandez's prison rules violations and criminal history, and reminded the court that the evidence was in the court file, Hernandez argues the trial court in March 2018 should have made its own informed,

particularized determination regarding the need for restraints, rather than adopting the prior judge's January 2018 ruling.

Hernandez further contends that the evidence was insufficient to support the trial court's finding of need in January 2018. According to Hernandez, the CDCR's classification of Hernandez's security risk was irrelevant. In addition, Hernandez argues, the evidence that he fought with other inmates or possessed a weapon in prison was irrelevant because such behaviors are common in prison and there was no evidence that he was the aggressor or had a propensity for violence.

The People argue Hernandez forfeited the issue by failing to object to the January 2018 ruling or renew his objection to shackling during the March 2018 hearing. Regardless, we find Hernandez's contentions without merit.

A defendant may be physically restrained at trial only if there is a "manifest need for such restraints." (*People v. Duran* (1976) 16 Cal.3d 282, 290-291 (*Duran*); see also *Holbrook v. Flynn* (1986) 475 U.S. 560, 568-569 [89 L.Ed.2d 525, 534] ["shackling . . . should be permitted only where justified by an essential state interest specific to each trial"].) Although a record of violence or current violent charges cannot alone justify a defendant's shackling (*Duran*, at p. 293), the manifest need requirement is "satisfied by evidence that the defendant has threatened jail deputies, possessed weapons in custody, threatened or assaulted other inmates, and/or engaged in violent outbursts in court." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1031; see also *People v. Hawkins* (1995) 10 Cal.4th 920, 944 [sufficient evidence of a manifest need for shackling order where the defendant had a history of (1) criminal violence and (2) violent and nonconforming behavior in jail], abrogated on another ground in *People v. Lasko* (2000) 23 Cal.4th 101, 110.) We will uphold a trial court's decision to shackle a defendant, absent an abuse of discretion. (*Lewis and Oliver*, at p. 1032.)

Even if the trial court in March 2018 erred in adopting the prior judge's January 2018 finding of manifest need for shackling, we find no prejudice because sufficient

evidence supported the January 2018 finding. Hernandez had multiple instances of "violence" or "nonconforming conduct" while in custody, including committing battery on another inmate with a weapon in 2014, and possessing a deadly weapon in 2017. (See *Duran, supra*, 16 Cal.3d at pp. 290-291.) In addition, Hernandez had a violent criminal history, including a 2017 conviction for manufacturing a dangerous weapon while being an inmate. Hernandez was also convicted of first degree murder in 2012 and domestic violence in 2006. Hernandez was not prejudiced by the order to shackle him.

DISPOSITION

The judgments are affirmed.

KRAUSE, J.

We concur:

MAURO, Acting P. J.

HOCH, J.